

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

United States Courts  
Southern District of Texas  
FILED  
AR JAN 13 2004  
Michael N. Mulby, Clerk

In Re ENRON CORPORATION  
SECURITIES, DERIVATION &  
"ERISA" LITIGATION,

§  
§  
§

MDL 1446

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MARK NEWBY, ET AL.,

§  
§  
§

Plaintiffs

VS.

§  
§  
§

CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

ENRON CORPORATION, ET AL.,

§  
§  
§

Defendants

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SILVERCREEK MANAGEMENT INC.  
ET AL.,

§  
§  
§

Plaintiffs,

VS.

§  
§  
§

CIVIL ACTION NO. H-02-3185

SALMON SMITH BARNEY, INC., ET  
AL.,

§  
§  
§

Defendants.

**SILVERCREEK PLAINTIFFS' OPPOSITION TO DEFENDANTS'  
MOTIONS FOR CLARIFICATION AND/OR RECONSIDERATION OF THE  
COURT'S DECEMBER 10, 2003 MEMORANDUM AND  
ORDER AND CROSS-MOTION FOR CLARIFICATION**

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1. Plaintiffs, Silvercreek Management, Inc., Silvercreek Limited Partnership, Silvercreek II Limited, OIP, and Pebble Limited Partnership (“Plaintiffs” or “the Silvercreek Plaintiffs”) respectfully submit this joint opposition to the motion filed by Defendant Goldman Sachs & Co. (“Goldman, Sachs”) and the joint motion filed by Banc of America Securities LLC, Bank of America Corporation (collectively “B of A”), Salomon Smith Barney Inc., and Citigroup Inc. (“Salomon Smith Barney” and “Citigroup”). Goldman Sachs’ motion seeks clarification and reconsideration of this Court’s December 10, 2003 Memorandum and Order, while B of A’s and Citigroup’s motion is unclear: the title states that the parties seek “an order clarifying” the Court’s December 10, 2003 Memorandum and Order, while the motion itself apparently seeks reconsideration of that order as well (joint motion at p. 7, ¶ 25). Defendants’ motions are an affront to the Court, as it is clear that the Court undertook a painstaking analysis of the relevant pleadings and the relevant law in issuing the thirty-nine page December 10, 2003 Memorandum and Order; Defendants’ motions seek to render that effort a nullity.

#### I. INTRODUCTION AND PROCEDURAL BACKGROUND

2. The Silvercreek Plaintiffs are parties to one of the individual actions which are part of MDL 1446. The Silvercreek Plaintiffs initially filed a complaint against Salomon Smith Barney, Goldman, Sachs, Banc of America Securities, and Arthur Andersen in the District Court for the Southern District of New York on January 16, 2002 (the “Initial Action”).

3. Defendants Salomon Smith Barney and Banc of America Securities responded to the complaint in the Initial Action by filing a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6). Goldman, Sachs filed a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6), and also sought (in the alternative) a motion compelling the Silvercreek Plaintiffs to arbitrate their claims against

Goldman, Sachs.

4. On or about June 24, 2002, this action was transferred to MDL 1446. On or about September 6, 2002, this Court entered an order of consolidation pursuant to which this action was consolidated into *Newby et al. v. Enron Corporation, et al.*, H-01-3624.

5. As of the date that this action was transferred to this Court and through April of 2003, there had been no ruling on the motions to dismiss the complaint in the Initial Action.

6. On March 28, 2003, the Silvercreek Plaintiffs filed a motion for leave to file an amended complaint in the Initial Action. The Silvercreek Plaintiffs were entitled, as a matter of right, to amend the complaint in the Initial Action pursuant to Fed. R. Civ. Proc. 15(a) (“[a] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served . . .”); *see also Willis v. Collins*, 989 F.2d 187, 188-189 (5<sup>th</sup> Cir. 1993) (motion to dismiss is not a responsive pleading). The reason why the Silvercreek Plaintiffs sought leave to file an amended complaint was this Court’s August 5, 2002 order, which provided that “all claims and/or complaints not encompassed within the Consolidated Complaint are STAYED at this time; . . .”

7. On April 17, 2003, Banc of America and Salomon Smith Barney entered into a stipulation with the Silvercreek Plaintiffs regarding the motion for leave to amend the complaint which provided, *inter alia*, that:

(a) Bank of America and Salomon Smith Barney consented to the Silvercreek Plaintiffs’ request for leave to file the amended complaint provided that

(I) if any other defendant opposes the motion and the Court denies the Motion, then such denial shall be deemed to apply to Defendants Salomon and Banc of

America, the First Amended Complaint shall be deemed withdrawn, and the original Complaint shall be the operative complaint in this matter[.]

8. On April 21, 2003, this Court entered the aforementioned stipulation and order.

9. Defendant Goldman, Sachs was not a party to the aforementioned stipulation, and did not file any opposition to the Silvercreek Plaintiff's motion for leave to amend the complaint. Pursuant to this Court's Local Rules, "[f]ailure to respond will be taken as a representation of no opposition." LR 7.4.

10. On December 10, 2003, this Court issued a Memorandum and Order partially granting the motions to dismiss directed at the complaint filed in the Initial Action. The Court's order did not state whether, as to those claims which were dismissed, the dismissal was without prejudice and the Silvercreek Plaintiffs would be granted leave to amend.

## II. ARGUMENT

A. The First Amended Complaint Should Be Deemed Filed Because Salomon and Banc of America Stipulated to its Filing, and Goldman, Sachs Never Opposed The Silvercreek Plaintiffs' Motion to Amend

11. Each of the defendants requests that this Court clarify the December 10 Order to state that the First Amended Complaint is not operative. Salomon Smith Barney and Banc of America both consented to the filing of the amended complaint in a stipulation and order which was entered by the Court on April 21, 2003. The only condition which would effect whether the First Amended Complaint should be deemed filed was subparagraph (I), which provided that

"if any other defendant opposes the Motion and the Court denies the Motion, then

such denial shall be deemed to apply to Defendants Salomon and Banc of America, the First Amended Complaint shall be deemed withdrawn, and the original Complaint shall be the operative complaint in this matter.”

12. The only other defendant who was a party to the motion to amend was Goldman, Sachs, which chose not to file any opposition to the motion. Pursuant to this Court’s Local Rules, the failure to file an opposition is “taken as a representation of no opposition.” Thus, the First Amended Complaint should be deemed filed *nunc pro tunc* as of April 21, 2003, and B of A and Salomon should not be heard to complain about the filing of the First Amended Complaint as they have stipulated that the First Amended Complaint would be filed unless a party opposed the motion.

13. Defendants’ assertions that the Court was mistaken in stating that the additional claims in the First Amended Complaint which were not the subject of the motions to dismiss are “unchallenged” and “pending” are similarly without merit. Nowhere does the Court state, nor have the Silvercreek Plaintiffs contended, that Defendants will not be able to respond to those claims in any manner permitted under the law. They may do so in accordance with this Court’s orders governing the management of this litigation. However, in light of this Court’s December 10, 2003 Memorandum and Order, Defendants should not be permitted to reassert the same arguments that they have previously made in their prior motions to dismiss, as this Court has already carefully reviewed and considered those arguments. It would be a waste of this Court’s resources to permit Defendants to again make the same challenges to these claims.

B. There is No Basis for Reconsideration of the Court's

December 10, 2003 Memorandum and Order

14. The Court's December 10, 2003 order is well-reasoned, and properly applies the law to the facts. Goldman, Sachs has not set forth any basis to reconsider the December 10, 2003 order. While this Court's Local Rules do not set forth standards for reconsideration, the applicable standards are typically a mistake of law, mistake of fact or newly discovered evidence. *See McNamara v. Bre-X Minerals Ltd.*, 68 F.Supp.2d 759, 760-761 (E.D. Tex. 1999) "[m]otions for reconsideration are permitted only in narrow situations, primarily 'to correct manifest errors of law or fact or to present newly discovered evidence'", *quoting Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989). Goldman, Sachs argues that the Court's consideration of the Declaration of Louise Morwick, which had been stricken in a previous order, is a ground for reconsideration. However, the Court can reach the same conclusion that it did in its December 10, 2003 Memorandum and Order without considering the Declaration of Louise Morwick. The Morwick Declaration was submitted to address *factual* issues raised by the Defendants which the Silvercreek Plaintiffs deemed inappropriate on a motion to dismiss. Whether or not the Morwick Declaration is considered, the bottom line is that the arguments made by Goldman, Sachs in relation to the Silvercreek Plaintiffs' Section 11 claims are issues of fact not properly resolved on a motion to dismiss. *See* Memorandum and Order, dated December 10, 2003, p. 32-33 (discussing *factual* challenges made by Defendants in their motions to dismiss, and stating "fact issues [are] not properly resolved on a motion to dismiss."); *see also Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5<sup>th</sup> Cir. 1982) (on a motion to dismiss, the complaint must be liberally construed in favor of the plaintiff, and all well-pleaded facts are accepted as true). There is no basis

for reconsideration.

C. The Court Should Clarify That The Dismissal of Certain Claims Was Without Prejudice and With Leave to Amend

15. The December 10, 2003 Order does not state whether the dismissal of certain claims was with prejudice. The Silvercreek Plaintiffs respectfully submit that the dismissal should be without prejudice and that the schedule established by this Court's July 11, 2003 order should govern any amendment. Leave to amend should be granted unless there has been undue delay, bad faith, a dilatory motive, prejudice to the other party, or if amendment would be futile. *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5<sup>th</sup> Cir. 1996); *see also La Porte Const. Co., Inc. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5<sup>th</sup> Cir. 1986) (“[g]enerally, when a court dismisses a complaint under Rule 12, the court should allow the plaintiff leave to amend its complaint to correct the defect.”). None of the circumstances described in *Rolf* are present here, and as the Court is aware further facts concerning the defendants' involvement in the Enron debacle continue to come to light through, *inter alia*, such investigations as that which resulted in the Goldin Report.<sup>1</sup>

D. While There Is No Reason to Change the Schedule That Salomon, Banc of America, and the Silvercreek Plaintiffs Agreed to, the Silvercreek Plaintiffs Do Not Object To This Request

16. Although Salomon, Bank of America and the Silvercreek Plaintiffs previously agreed that the schedule set forth in the April 21, 2003 stipulation and order would govern, Salomon and Bank of America now ask that instead the schedule set forth in this Court's July 11, 2003 order

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<sup>1</sup> Report of Harrison J. Goldin, the Court-Appointed Examiner in the Enron North America Corp. Bankruptcy Proceeding, Respecting His Investigation of the Role of Certain Entities in Transactions Pertaining to Special Purpose Entities (November 14, 2003).

govern this action. In the interests of uniformity and efficiency, the Silvercreek Plaintiffs do not object to this request.

17. A proposed order granting the relief sought herein, and denying the relief sought by defendants, is being submitted concurrently with this brief.

III. CONCLUSION

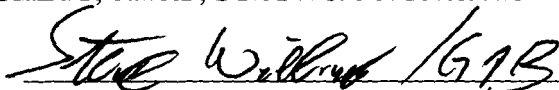
Based on all the foregoing, defendant's motion for clarification and reconsideration should be denied in its entirety, and the Court should clarify that the dismissal of claims in the December 10, 2003 Memorandum and Order was without prejudice and with leave to amend.

DATED: January \_\_, 2004

Respectfully submitted,

COTCHETT, PITRE, SIMON & McCARTHY

By:

A handwritten signature in black ink, appearing to read "Steve Williams / GJB", is written over a horizontal line.

STEVEN N. WILLIAMS  
JOSEPH W. COTCHETT  
STEVEN N. WILLIAMS (SW-6198)  
San Francisco Airport Office Center  
840 Malcolm Road, Suite 200  
Burlingame, CA 94010  
(650) 697-6000

STANLEY GROSSMAN (SG-4544 )  
H. ADAM PRUSSIN (HP-1503)  
SHAHEEN RUSHD (SR4256)  
POMERANTZ HAUDEK BLOCK  
GROSSMAN & GROSS LLP  
100 Park Avenue  
New York City, NY 10017  
(212) 661-1100

OF COUNSEL:

Geoffrey A. Berg  
Dow Golub Berg & Beverly, LLP  
8 Greenway Plaza, 14<sup>th</sup> Floor  
Houston, Texas 77046  
(713) 526-3700/ Fax (713) 526-3750

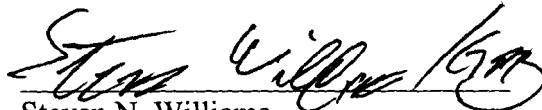
CERTIFICATE OF CONFERENCE

On January 7, 2004, I wrote to counsel for each of the defendants who are parties to this motion and asked whether their clients would object to the Silvercreek Plaintiffs' request for clarification of the Court's December 10, 2003 Memorandum and Order, specifically to clarify that the dismissal of certain claims in that Order was without prejudice and with leave to amend. Counsel for each of the defendants has stated that their clients do not consent to this request.

  
Steven N. Williams

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by website, <http://www.esl3624.com>, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this 13<sup>th</sup> day of January, 2004.

  
Steven N. Williams